

STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF STATE OF MICHIGAN,

Plaintiff-Appellee,

vs

WILLIAM JERMICHAEL CARTER,

Defendant-Appellant.

Supreme Court No. 129614

COA No 260369

Cir. Ct. No. 99-04389

**SUPPLEMENTAL BRIEF IN SUPPORT OF
APPLICATION FOR LEAVE TO APPEAL**

129614
Suppl

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SUPPLEMENTAL ARGUMENT

DEFENDANT-APPELLANT IS ENTITLED TO A PEREMPTORY REVERSAL AND A RESENTENCING WHERE THE ORIGINAL SENTENCING JUDGE APPLIED AN INCORRECT SENTENCE GUIDELINE RANGE, AND WHERE UPON REVIEW, A SUBSTITUTE TRIAL COURT JUDGE DETERMINED THAT HE WOULD HAVE IMPOSED THE SAME SENTENCE DESPITE THE CORRECTED, LOWER GUIDELINE RANGE, BUT FAILED TO ALLOW ALLOCUTION BY THE DEFENDANT, A RESENTENCING, OR A HEARING OF ANY KIND.

A. Case background on sentencing issues:

Defendant-Appellant William Jermichael Carter was originally charged in Kent County Circuit Court with second degree murder, contrary to MCL 750.317, and driving while license suspended, contrary to MCL 257.904A, arising out of an incident in which the deceased was killed in a traffic accident. The prosecution's theory at trial was that Mr. Carter acted with reckless disregard for the life of the deceased based upon his conduct leading up to, and at the time of the accident. On November 9, 1999, following a jury trial before the Honorable David H. Soet, Mr. Carter was convicted of second-degree murder and driving without a license. On December 28, 1999, Mr. Carter was sentenced to a term of 24 to 45 years imprisonment for the murder conviction and to time served for driving without a license.

At the time of sentencing, Mr. Carter was attributed 100 points under offense variable #3 under the 1999 Michigan Sentencing Guidelines, however, under OV 3, 100 points are applicable only for non-homicide offenses. The scoring of 100 points elevated Mr. Carter incorrectly into a category III offense variable and enhanced his guideline range. Defendant failed to raise this issue on direct appeal. Thereafter, in a

motion filed pursuant to MCR 6.500, the defendant raised this issue coupled with a claim of ineffective assistance of trial and appellate counsel. In the trial court, replacement Judge James Redford ruled that there had been an error in the scoring of OV 3 by the Honorable David Soet at the time of the original sentencing, but that the defendant's substantial rights had not been impaired. In so holding, replacement Judge Redford held as follows:

The Court further finds that even if the defendant were to be given the relief requested as relates to OV 3; having reviewed all the facts of the case, the trial transcripts and being otherwise fully advised of the issues at bar, this Court on resentencing would impose the identical sentence imposed on December 28, 1999.

Opinion and Order Denying Motion for Relief From Judgment, 7/20/04, p 8. The Michigan Court of Appeals denied leave to appeal.

**B. Case law regarding error in sentence guidelines,
where sentence falls within both guidelines ranges:**

In these proceedings, the prosecution has argued that the court should deny relief simply because the actual sentence imposed on this defendant falls within both the correct and incorrect sentence guideline ranges. This Court rejected that argument in People v Francisco, 474 Mich 82, 89-90 (2006).

MCL 769.3(10) makes clear that the Legislature intended to have defendants sentenced according to accurately scored guidelines and in reliance on accurate information (although this Court might have presumed the same even absent such express language). Moreover, we have held that a sentence is invalid if it is based on inaccurate information." People v Miles, 454 Mich 90, 96, 559 NW2d 299 (1997). In this case, there was a scoring error, the scoring error altered the appropriate guidelines range, and defendant preserved

the issue at sentencing. It would be in derogation of the law, and fundamentally unfair, to deny a defendant in the instant circumstance the opportunity to be resentenced on the basis of accurate information. A defendant is entitled to be sentenced in accord with the law, and is entitled to be sentenced by a judge who is acting in conformity with such law.

Id. 89-91 (footnote materials omitted). See also Towsend v Burke, 334 US 736, 68 Sct 1252, 92 LEd 1690 (1948) (defendant has a Due Process right to be sentenced on the basis of accurate information).¹

A similar approach has been taken by federal courts in analogous cases. In United States v Gill, 348 F3d 147, 155 (6th Cir 2003), the Court ordered a resentencing where the error affected the guideline range, and where the initial sentence fell within both ranges. The Court also set forth the applicable standard for determining whether a resentencing is required.

[T]he government insists that the district court's error was harmless because the sentence of 21 months is admittedly within both of the competing guideline ranges in this case. Harmless error is not an inevitable conclusion under these circumstances. Rather, in determining whether a remand is required, a reviewing court "... must decide whether the district court would have imposed the same sentence had it not relied upon the invalid factor or factors."

Gill, 348 F3d at 155, quoting from Williams v United States, 503 US 193, 203; 112 Sct 1112; 117 LEd2d 341 (1992). Significantly, in Gill, the Court observed that "[w]hen the [sentencing] court

¹ In this case, although the defendant failed to preserve the scoring error, this error results in relief because the claim is one that affects the defendant's substantial rights, and the claim has been tied (throughout the 6.500 proceedings) to a valid claim of ineffective assistance of counsel. People v Crossley, 2002 WL 31929332 (Mich App) (unpublished and appended).

sentences a defendant to the low end of the guideline range ... the [reviewing] court can reasonably infer that the defendant might have received a lower sentence if the guideline range itself had been lower." Similarly, the sentence imposed against Mr. Carter, 288 months, was at the low end of the incorrect (higher) guideline range, 270 months to 450 months. Consequently, the holding of Gill likewise supports an order of resentencing.²

The Williams case from the United States Supreme Court is also instructive on the issue of the respective burdens of proof of the parties.

... [A] court of appeals must decide whether the district court would have imposed the same sentence had it not relied upon the invalid factor or factors."

We conclude that the party challenging the sentence on appeal, although it bears the initial burden of showing that the district court relied upon an invalid factor at sentencing, does not have the additional burden of showing that the invalid factor was determinative in the sentencing decision. Rather, once the court of appeals has decided that the district court misapplied the [g]uidelines, a remand is appropriate unless the reviewing court concludes, on the record as a whole, that the error was harmless, i.e., that the error did not affect the district court's selection of the sentence imposed.

² Judge Redford ruled that a correctly scored OV#3 would result in zero points, placement in offense variable category I, with a corresponding sentence guideline range of 180 to 300 months. Thereafter, on July 26, 2005, this Court ruled in People v Houston, 473 Mich 399 (2005), that under the instant circumstances, 25 points are to be assessed under OV#3. Based upon the holding of Houston, Mr. Carter would fall within offense variable category II, with a corresponding sentence guidelines range of between 225 to 375 months. His actual sentence was 288 months. Consequently, even after the Houston decision, the scoring error resulted in an improperly elevated guideline range.

Williams, 503 US at 203.

While the Williams case involved an interpretation of the burdens of proof for purposes of the federal sentencing guidelines, its analysis applies with equal force here, and is a fairer test than that proposed by the prosecution during this appeal -- i.e., barring resentencing to any defendant whose sentence falls within both guidelines.

C. Defendant's right to allocution at the time of sentence:

On Defendant-Appellant's motion for reconsideration in the trial court in the 6.500 proceedings, Judge Redford assumed that an error occurred with respect to the guidelines (implicitly accepting the defendant's ineffective assistance claim), however, the court concluded that its sentencing would be no different than that which was imposed originally. The court failed to order a hearing of any kind. However, this reasoning ignores the defendant's right to allocute at his resentencing once the reviewing court determines that an error has occurred.

Under Michigan law, the right of allocution is embodied in MCR 6.425(D)(2)(c), which affords both the defendant and his lawyer "an opportunity to advise the court of any circumstances they believe the court should consider in imposing sentence." While the trial court need not specifically ask the defendant if he has anything to say on his own behalf before sentencing, the defendant must be given the opportunity to address the court if he chooses. People v Petit, 466 Mich 624, 628 (2002).

Federal authorities have long recognized the importance of a

defendant's right of allocution. In United States v Alba Pagan, 33 F3d 125, 129 (1st Cir 1994), the Court noted as follows.

The right of allocution affords a criminal defendant the opportunity to make a final plea to the judge on his own behalf prior to sentencing. See United States v Behrens, 375 US 162, 165; 84 Sct 295, 296-97; 11 LEd2d 224 (1963). Ancient in law, allocution is both a rite and a right. It is designed to temper punishment with mercy in appropriate cases, and to ensure that sentencing reflects individualized circumstances.

Similarly, in Green v United States, 365 US 301, 304; 81 Sct 653; 5 LEd2d 670 (1961), the United States Supreme Court noted that "[t]he most persuasive counsel may not be able to speak for a defendant as the defendant might, with halting eloquence, speak for himself." Id. 304. In Alba Pagan, the Court held that

... allocution continues to play a salient role in criminal cases. Thus, while we do not attach talismanic significance to any particular string of words, a defendant must at least be accorded the functional equivalent of the right. And, moreover, functional equivalency should not lightly be assumed. Though there may be cases in which a defendant, despite the absence of the focused inquiry that the language of the rule requires, can be said to have received its functional equivalent, such cases will be few and far between. Doubts should be resolved in the defendant's favor.

Id. 129.

In this case, the prosecution may argue in supplemental briefing that the defendant was afforded the functional equivalent of allocution by virtue of the fact that a substitute judge familiarized himself with the court file prior to the denial of resentencing. However, Judge Redford's opinion does not indicate that he read the sentencing transcript. See Opinion at p 8. Moreover, a reviewing judge's cursory reading of a paper

court file is no substitute for face-to-face allocution by the defendant. In United States v Li, 115 F3d 125, 132 (2d Cir 1997), the Court noted that the rules regarding allocution "demand that each defendant be allowed a meaningful right to express relevant mitigating information before an attentive and receptive district judge."

While the United States Supreme Court has not yet ruled that a defendant has an absolute right, based in the constitution, to allocute at the time of sentence, some courts have ruled that once the defendant makes a request that he be permitted to speak to the trial court before sentencing, the denial of that opportunity offends due process. See Boardman v Estelle, 957 F2d 1523, 1525 (9th Cir 1992); United States v Chong, 104 FSupp2d 1232 (D Ha 1999). Mr. Carter requests a resentencing and the opportunity to allocute.

D. Right of allocution upon reconsideration of sentence:

In United States v Barnes, 948 F2d 325 (7th Cir 1991), the Court held that the defendant had a right of allocution upon resentencing. In Barnes, the imposition of the defendant's sentence as to a conspiracy count had been deferred. In addition, on remand from the Seventh Circuit, the defendant's sentence as to that count had been vacated because of the trial court's improper consideration of hearsay at sentencing. The Court held that Mr. Barnes was entitled to the right to allocute on remand holding as follows:

...The right of allocution allows a defendant to personally address the court before sentencing in an

attempt to mitigate punishment. With historical roots in the common law, the opportunity to plead for mercy is another provision in a procedural body of law designed to enable our system of justice to mete out punishment in the most equitable fashion possible, to help ensure that sentencing is particularized and reflects individual circumstances.

... As early as 1689, the common law acknowledged that a court's failure to invite the defendant to speak before sentencing required reversal ... Aside from its practical role in sentencing, the right has value in terms of "maximizing the perceived equity of the process."

... [T]he opportunity to address the court at a subsequent hearing arises precisely because the scope of punishment is not preordained. The right to allocution is the right to have your request for mercy factored into the sentencing decision.

Id. 328-329 (citations omitted).

Moreover, in Barnes, the Court recognized the special need for allocution when a defendant's sentence is being redetermined.

The right of allocution in this instance is particularly important because the understandable potential for an inherent and troublesome momentum in resentencing makes it especially inviting for trial judges to engage in overly swift sentencing determinations.

...The right of allocution is minimally invasive of the sentencing proceeding; the requirement of providing the defendant a few moments of court time is slight. Because the sentencing decision is a weighty responsibility, the defendant's right to be heard must never be reduced to a formality. In an age of staggering crime rates and an overburdened justice system, courts must continue to be cautious to avoid the appearance of dispensing assembly-line justice. In resentencing Barnes on remand, we are confident that the experienced and concerned trial judge will carefully weigh any mitigating comments the defendant may offer and scrupulously consider the severity of the defendant's original sentence on the distribution count.

Id. 331. Based upon the foregoing persuasive authority,

Defendant-Appellant maintains that this Court should find that the right of allocution applies to a resentencing.

E. Erroneous analysis employed by substitute judge:

Defendant-Appellant maintains that the substitute sentencing judge used the wrong analysis in determining whether the defendant was entitled to a full resentencing. In addressing this issue, Judge Redford (the substitute sentencing judge) found that he would not have sentenced the defendant differently even under the newly corrected sentence guidelines. However, under a correct formulation of the pertinent legal issue, the substitute sentencing judge should have been deciding whether or not the *original* sentencing judge would have sentenced the defendant differently in light of the corrected guidelines. Applying that analysis, there is ample evidence in this record that a proper recognition of the correct sentence guidelines range would have made a difference to Judge Soet, the original sentencing judge. At the original sentencing, Judge Soet noted that "over the last ten years", two other defendants had been charged with second degree murder in traffic deaths in Kent County Circuit Court.

Those crimes were almost identical in every way to this one, young men highly intoxicated, driving at reckless speeds, 70, 80, 90 miles an hour, and running red lights, who hit and kill someone.

(Sentence Hearing, 12/28/99, p 6). In each of these cases (one before Judge Soet, the other before Judge Benson), the defendants received a 12 year sentence. (*Id.*). According to Judge Soet, the difference in Mr. Carter's case was that the court was now bound

by the sentence guidelines which "went into effect on January 1, 1999." (Id.).

They apply to Mr. Carter. They are significantly longer than they used to be.

.... I follow guidelines because as a Judge I feel it my duty to consider this as the policy of the state and as the gathered and carefully considered wisdom of a large group of Judges and other prominent citizens who have reviewed the entire subject. I rarely depart from them, and I see no reason in this case to depart from them.

(Id. 6-7). Consequently, Judge Soet's comments reflect his belief that the guidelines compelled him to impose a harsher sentence than he ordinarily would have for a defendant like Mr. Carter. It is also significant, under either the Francisco or the Williams analysis, that Judge Soet sentenced Mr. Carter at the low end of the incorrectly calculated guideline range.

Consequently, Defendant-Appellant maintains that had Judge Redford (the substitute sentencing judge) employed the correct analysis, he would have concluded that "[Judge Soet] would not have imposed the same sentence had [he] not relied upon" the incorrectly calculated sentence guideline range. Gill, 348 F3d at 155; Williams, 503 US at 203.

Defendant maintains that the above analysis applies. Assuming for purposes of argument only that in a substitute judge situation, the substitute judge must merely determine the defendant's sentence based upon what the *substitute* judge would do if the defendant were being sentenced today, a full resentencing is required. In other words, if the question is "what would Judge Redford do knowing of the correctly calculated

guideline range?", this question cannot be answered unless Judge Redford proceeds to a full resentencing during which he sees the defendant in person, and during which the defendant has the opportunity to allocute, and the right to plead for mercy. Defendant submits that if he were afforded the opportunity to appear and be resentenced, a more mature Mr. Carter would avail himself appropriately of that right, he would emphasize facts in mitigation, and he would plead directly and personally to Judge Redford for mercy.

Arguably, the instant case can be distinguished from that in which a remand for reconsideration of sentence is ordered before the same judge. In that scenario, the original sentencing judge has all of the tools available to him, including his own participation in the original sentencing and his own prior experience in listening to and observing the defendant's allocution. By contrast in this case, Judge Redford (the substitute sentencing judge) has never seen or heard Mr. Carter.

During oral argument in the Francisco case, this Court suggested a concern that its ruling might trigger a floodgate of incarcerated defendants with non-substantial guidelines scoring errors who would then have to be writted across the state, at great public expense, for their court appearances at resentencing. However, Mr. Carter's case presents the Court with a far more limited category of defendants -- i.e., those in which the original sentencing judge is retired or is otherwise unavailable. In this unique (small) class of cases, the limited

remand, in which the sentence is merely reconsidered or rearticulated, is inadequate. Full resentencing is required in Mr. Carter's case because he is requesting the right of allocution and a new judge will be resentencing him.

* * *

Jermichael Carter was eighteen years old at the time of the offense in this case. He is serving a sentence of twenty-four years in prison. A sentence of this magnitude is typically reserved homicides involving intentional killings with aggravating factors.³ Even sentences imposed for drag racing homicides (a crime which involves conduct much more akin to intentional homicide than that involved here), are significantly lower than that imposed upon this defendant.⁴

Most significantly, the sentence imposed on this defendant was double the sentence imposed in the past by the same judge

³ For example, in People v Olson, 2003 WL 22928766 (Mich App) (unpublished and appended), the defendant was sentenced to a 22 year minimum prison sentence for firing multiple gunshots at a crowd of people, killing one person, striking another. In People v Burch, 2003 WL 22399517 (Mich App) (unpublished and appended), the defendant received a 22 1/2 year minimum sentence for a brutal beating murder which left the deceased with multiple fractures of the skull, cheekbone, nose, jaw and dentures, and which involved the defendant's statement "... I'm gonna kill you" moments before the killing. In People v Bowden, 2003 WL 33343986 (Mich App) (unpublished and appended), the defendant received a 25 year minimum sentence for shooting his mother multiple times with a semi-automatic weapon. See also People v Dustin Miller, 2003 WL 22339889 (Mich App) (unpublished and appended) (29 year sentence, multiple stab wounds).

⁴ Research reveals that drag racing vehicular homicides in other parts of the state are routinely charged only as involuntary manslaughter. See e.g. People v Pruitt, 2001 WL 83222985 (Mich App 2001) (unpublished and appended). In Pruitt, the defendant was sentenced to 6 to 15 years in a case which involved three deaths. There is no allegation of drag racing in this case.

upon an identically situated defendant. According to the sentencing judge, he imposed such a harsh sentence because he believed he was bound by the "new", "harsher" sentencing guidelines, which had gone into effect three days earlier. Unfortunately, for Mr. Carter, the sentencing court miscalculated the guidelines.

Finally, even under the prosecutor's theory at trial, this was an unintentional killing -- a traffic *accident*. Here, the vehicle driven by the deceased came into Blazer's view within moments of the impact causing death in this case, with the driver of the Blazer attempting to veer the Blazer away from the deceased's car. While these facts do not exculpate the driver of the Blazer, they certainly mitigate against the element of intentionality. A twenty-four year sentence under these circumstances should be evaluated with some scrutiny, particularly where the defendant was sentenced based upon the wrong sentence guideline range.

Consequently, it was error for Judge Redford to have ruled that he would not impose a different sentence based only upon a review of the court file. He must actually "resentence" the defendant, allowing an opportunity for allocution, in order to determine what the defendant's sentence should be.

RELIEF REQUESTED

WHEREFORE, based upon all the foregoing reasons, Defendant-Appellant requests that this Court issue a peremptory decision, vacating Mr. Carter's sentence, and remanding the case to the trial court for a resentencing.

Respectfully submitted,

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